

### REMARKS

Claims 1-49 are pending in the above-identified application. Claims 6, 17-34, 40, 42-45 and 47 have been cancelled without prejudice or disclaimer, and claims 47 and 48 have been amended. Accordingly, claims 1-5, 7-16, 35-39, 41, 46, 48 and 49 will be pending in the application upon entry of the amendments presented herein.

The specification has been amended as follows: at page 1, to update the related applications section by inserting the patent number of Ser. No. 09/134,403, filed August 14, 1998 14; at page 14, to correct the reference to Figure 3; at page 14, to insert the ATCC number for organism M5A1; at page 15, to insert the ATCC number for organism P2; at page 20, to correct the address of the American Type Culture Collection; and at page 48, to insert the ATCC numbers for strains M5A1 and P2. Claims 48 and 49 have been amended to recite the ATCC deposit numbers for the strains recited therein. Support the amendments to claims 48 and 49 can be found throughout the specification and claims as originally filed. In particular, support can be found in the specification at least, for example, at page 14, line 31 through page 15, line 2; in Example 9, pages 47-52; and in Figures 5 and 6. No new matter has been added.

Attached hereto is Appendix A titled **"Version with Markings to Show Changes Made,"** which indicates the specific amendments made to the specification and the claims. For the Examiner's convenience, a copy of the claims that will be pending upon entry of the amendments presented herein is attached hereto as Appendix B.

### *Election/Restriction*

Applicants note that the restriction requirement has been made final. Claims 17-23, 25-32, 40, 42-45 and 47 (Group II) have apparently been withdrawn from consideration as directed to non-elected subject matter, although the instant Office Action does not so indicate. Further, the previous Office Action, in which the Restriction Requirement was originally made, did not include claim 24 in Group II. However, because claim 17 was included in Group II and because claim 24 depends from claim 17,

Applicants assume claim 24 was intended to be included in Group II and, therefore, embodies non-elected subject matter. Accordingly, Claims 17-32, 40, 42-45 and 47 have been cancelled without prejudice or disclaimer as directed to non-elected subject matter. However, Applicants hereby reserve the right to pursue the non-elected subject matter of the foregoing claims in one or more divisional applications.

***Claim Rejections***

***Rejection under 35 USC §112, Second Paragraph***

Claims 49 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to point out particularly and claim distinctly the subject matter which Applicants regard as the invention. The Office Action indicates the claim is indefinite for failing to recite the ATCC deposit number for the strain recited therein. Claim 49 has been amended to recite the ATCC deposit number for the strain recited therein, thereby obviating the rejection. (Claim 48 has been similarly amended.) Reconsideration and withdrawal of the rejection are therefore respectfully requested.

***Rejection under 35 USC §112, First Paragraph***

Claims 48 and 49 are rejected under 35 U.S.C. §112, first paragraph, as based on a disclosure which is not enabling. Claim 48 has been amended to correctly identify the organism and both claims 48 and 49 have been amended to recite the missing ATCC numbers. Applicants submit herewith copies of part of a fax communication from Barbara Hailey, Administrator, Patent Department at the ATCC, which provides the ATCC numbers and the deposit records for strains M5A1 (handwritten number 14) P2 (handwritten number 15) recited in claims 48 and 49, respectively. These official ATCC documents indicate that the strains were deposited with the ATCC prior to the filing date of the grandparent application (Ser. No. 08/363, 868, filed December 27, 1994. As noted

above, claims 48 and 49 were amended to insert the ATCC numbers for the strains recited therein. In addition, the specification at pages 14, 15 and 48 was amended to insert the ATCC numbers for these strains. Accordingly, Applicants submit that claims 48 and 49 are fully enabled, and request reconsideration and withdrawal of the rejection.

***Double Patenting***

Claims 33-34 are rejected under 35 U.S.C. §101 as claiming the same invention as that of claims 42 and 43, respectively, of U.S. Patent 6,107,093. Claims 33 and 34 have been cancelled without prejudice or disclaimer, thereby obviating the rejection.

In addition, claims 1-16, 24, 35-39, 41 and 46 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5, 10-24 and 42-43 of U.S. Patent No. 6,107,093. The Office Action, Section 8, page 4, indicates that although the conflicting claims are not identical, they are not patentably distinct from each other because the subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter. The claims of the patent are covered by the broader claims of the current application and are thus common to both the patent and the current application.

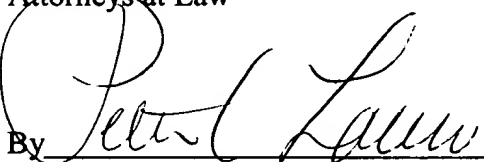
Applicants will address the double patenting rejection when all pending claims are indicated allowable but for the double patenting rejection.

### CONCLUSION

In view of the foregoing, Applicants respectfully submit that this application has claims containing allowable subject matter. No fees are believed necessary in connection with the filing of this response. However, if any such fee is deemed necessary, please charge the fee to Deposit Account 12-0080. If there are any remaining issues or the Examiner believes that a telephone conversation with Applicant's Attorney would be helpful in expediting prosecution of this application, the Examiner is invited to call the undersigned at the telephone number listed below.

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LAHIVE & COCKFIELD, LLP  
Attorneys at Law

By 

Peter C. Lauro, Esq.  
Reg. No. 32,360  
28 State Street  
Boston, MA 02109  
(617) 227-7400  
Facsimile (617) 742-4214